

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07/04/2003

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 1930 of 1991

Ramachandran ... Appellant

-Vs-

Y. Theva Nesom Ammal ... Respondent

Appeal under Section 100 CPC against the Judgment and Decree made in A.S. No. 180 of 1990 dated 28-10-1991 on the file of the Principal District Judge, Tirunelveli reversing the Judgment and Decree made in O.S. No. 26 of 1986 dated 28-08-1989 on the file of the Additional Subordinate Judge, Tirunelveli.

!For Appellant : Mr. Peppin Fernando

^For Respondent : Mr. I. Meerasahib

:JUDGMENT

The defendant, who lost his case before the lower Appellate Court is the appellant in this second appeal. The respondent herein has filed the suit O.S. No.26 of 1986 on the file of Additional Subordinate Judge, Tirunelveli for recovery of amount.

2. The case of the respondent herein is that she sold the property under Ex.A1 on 31-08-1984 for a total consideration of Rs.35,990/-, but the sale consideration is mentioned only as Rs.9,900/- in the deed as the appellant herein has agreed to pay the balance sum of Rs.26,00 0/- separately, later. Since the appellant failed to pay the said sum, as promised, the respondent has filed the above suit.

3. Before the trial court, the respondent herein has marked Exs. A1 to A9 and examined herself as PW1 and one Devasundaram, Advocate as PW2. The case of the appellant herein is that the sale consideration is only Rs.9,900/-, the claim of the respondent is false besides that barred under Section 92 of Indian Evidence Act. The appellant herein has marked Exs. B1 to B4 and examined himself as PW1. The trial court dismissed the suit.

Aggrieved by the Decree and Judgment of the trial court, the respondent herein has preferred appeal A.S. No. 180 of 1990 on the file of the Principal District Judge, Tirunelveli. The lower appellate Court reversed the Judgment and Decree passed by the trial court, hence this second appeal.

4. This second appeal has been admitted on the following substantial questions of law namely

1. Whether the lower Appellate Court failed to note that the claim of the respondent is barred under provisions of Section 92 of the Indian Evidence Act?

2. Whether the lower Appellate Court failed to note that the suit is barred under Section 23 of the Contract Act?

3. Whether the lower Appellate Court has erred in relying upon Ex.A8 to reverse the well considered judgment of the trial court?

4. Whether the lower Appellate Court is justified in awarding cost of courts below?

5. Mr. Peppin Fernando, learned counsel appearing for the appellant submitted as follows:-

The First Appellate Court erred in granting the Decree relying upon Ex.A8 but it did not make any reference to the appellant or the alleged transaction; that the evidence of PW2 cannot be relied upon for any purpose; that the sale consideration in Ex.A1 was Rs.9,900/- and at the time of sale there was a dispute on that property; that the suit claim is barred under Section 92 of the Indian Evidence Act; that the First Appellate Court, having rejected Exs. A2 and A3 ought to have rejected the entire claim of the respondents; that Exs. B1 to B4 clearly prove the consideration shown in Ex.A1 is the correct market value and prayed for setting aside the Decree and Judgment passed by the First Appellate Court.

6. The learned counsel appearing for the appellant relied on the following decisions in support of his case:-

i) Land Acquisition Officer & Mandal Revenue Officer Vs.

Narasaiah [2001] 1 Law Weekly 881 wherein the Honourable Supreme Court, while dealing with Section 51 (A) of Land Acquisition Act, Section 64 and 65 of Indian Evidence Act and Section 57 of the Registration Act pertaining to Land Acquisition cases held that "in the case of Section 51 (A) of the Land Acquisition Act also, the position cannot be different, as it is open to the Court to act on the documents regarding transactions recorded in such documents. However, this will not prevent any party, who supports or opposes the said document or the transactions recorded therein to adduce other evidence to substantiate their stand regarding such transactions. But, it is not possible to hold that even after the introduction of Section 51 A the position would remain the same as before."

In this case, the Honourable Supreme Court held that Section 51 A enables the Court to treat what is recorded in the document as evidence which is like any other evidence. But, it is for the Court to weigh all the pros and cons whether such transactions can be relied upon for understanding the real price of the land.

ii) Nawab Masjid Trust, by its Manager, A. Ahmed Akli Mohagir Vs. Chubhagmuell Gulecha [(2002) 3 MLJ 496] wherein the learned Single Judge of this Court, while dealing with Section 92 of the Indian Evidence Act held that it is well established in law that no party can be permitted to let in oral evidence contrary to the recitals in a written document and negated the plea of the defendants as the same is contrary to the written resolution.

iii) Mohammed Sheriff Alnahary, rep. by its Attorney, T. Venkatachalam Vs. K.T. Kunjumon [2002-2-Law Weekly 63 - wherein the learned Single Judge of this Court held that the best evidence about the contents of the document is the document itself. Section 91 is called a exclusive Rule since it excludes admission of oral evidence for proving the contents of documents except where secondary evidence is allowed. Section 92 does not bar consideration of any document, it prohibits admission of oral evidence which is contrary to the terms of the agreement.

iv) K.S. Narasimhachari Vs. The Indo Commercial Bank Ltd., G.T. Madras, represented by the Punjab National Bank and another [AIR 1965 Madras 147] wherein a Division Bench of this Court held that under Section 92 of Indian Evidence Act, while a party admits passing of consideration specified in the document attempts to show that the consideration was either less or more than what is specified is not to be permitted.

7. The learned counsel Mr. Meera Sahib appearing for respondent submits as follows:-

Section 92 of the Indian Evidence Act is not applicable to the facts and circumstance of the case; that the suit has been filed for recovery of amount based on Pronote dated 29-12-1984 namely Ex.A2 supported by Ex.A3 dated 27-12-1984 i.e., letter of undertaking executed by Thangamuthu, brother-in-law of the appellant herein. The respondent herein has sold land to an extent of 2.33 acres and executed Ex.A1, sale deed wherein the sale consideration was mentioned as Rs.9,900/- but the real sale consideration was Rs.35,990/-. It is also further argued that the appellant has executed the Pronote dated 29-12-1984 agreeing to pay the sum of Rs.26,000/-; that the brother-in-law of the appellant has executed a letter of undertaking dated 27-12-1984 which is marked as Ex.A3; that Ex.A4 is the reply in May 1985 sent by Devasundaram, Advocate to the respondent herein; that Ex.A5 is the Advocate notice sent to the appellant; that Ex.A6 is the reply notice sent by the appellant's advocate to the respondent's advocate. Ex.A7 is the telegram dated 11-09-1984 sent by Devasundaram, Advocate to the respondent herein; that Ex.A8 is the letter sent by Devasundaram, Advocate to the respondent herein and Ex.A9 is the specimen signature of the appellant; that the judgment and decree of the First Appellate Court is based on the oral and documentary evidence and applying the correct proposition of law as such interference of this Court is not warranted.

8. The learned counsel for the respondent further submitted that Ex.B1 is sale deed dated 17-01-1985 executed by sister of the respondent in respect of the land to an extent of 55 cents for a consideration of Rs.2,750/-; Ex.B2 is dated 29-09-1984, sale deed executed by sister of the respondent to an extent of 40 cents for a sum of Rs.4,050/-; Ex.B3 is dated 05-10-1984 sale deed executed by the sister of the respondent herein to an extent of 40 cents for a total sale consideration of Rs.2,750/-; Ex.B4 is dated 15-10-1984, sale deed executed by sister of the appellant to an extent of 51 cents for a total sale consideration of Rs.3,500/-. When taken into account of the sale consideration in Ex.B1 to B4 and the amount of Rs.35,990/- claimed towards sale consideration of Ex.A1 is proportionate and the alleged consideration of Rs.9,900/- mentioned in the sale deed is apparently disproportionate.

9. The trial court dismissed the suit relying on Section 92 of the Indian Evidence Act and held that the amount mentioned in the sale deed cannot be disputed later as lesser or more. On appeal, the First Appellate Court found that the alleged signature of the appellant contained in Ex.A2 is not similar as per the specimen signature obtained by the trial court in the open Court in Ex.A9 and the said pronote was not attested by witnesses and rightly eschewed the same from consideration as done by the trial court. The First Appellate Court held that the signature of the appellant found in Ex.A3 as witness is not tallying with the specimen signature namely Ex.A9 and rejected Ex.A3. The First Appellate Court further pointed out that the averment that Advocate namely Devasundaram has written Ex. A4 was not proved by the respondent and rightly rejected both. The First Appellate Court compared the sale considerations passed in Ex.B1 to B4 and held that the real consideration could be Rs.35,990/-.

10. Admittedly, the respondent herein has not filed any cross appeal or cross objection against the rejection of Ex.A2 and A3 by the First Appellate Court. The only document relied on by the First Appellate Court is Ex.A8 which was written by the Devasundaram, Advocate.

11. Now, I proceed to consider Ex.A8. Ex.A8 is a letter dated 24-01-1985 written by PW2 to the respondent herein in which the appellant is not a party. In the said letter, he has requested the respondent herein to send a telegram instructing him to collect money from the appellant herein, so that he could make use of the same to speak to the appellant. It is also further mentioned in the said letter that he would meet the appellant in person. Nothing was stated in the letter about the appellant's admission of his liability.

12. Ex.A5 is notice dated 10-05-1985 issued by the respondent's advocate to the appellant herein wherein no whispering about Ex.A8. PW2 in his evidence stated that he was not aware that the appellant was due to the respondent a sum of Rs.26,000/- but he admitted in his evidence that he requested the respondent herein to send a telegram so as to enable him to speak to the appellant herein. I am of considered view that the evidence of

PW2 do not support the case of the respondent.

13. The counsel appearing for either side advanced arguments about the applicability and non-applicability of Section 92 of Indian Evidence Act to the facts and circumstance of the case. Section 92 and Sub-clause 4 of Section 92 of Indian Evidence Act runs as follows:-

Section 92 □ Exclusion of evidence of oral agreement □ When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms;

Proviso (4) □ The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Section 92 contemplates that when terms of any contract, grant or other disposition of the property or any matter required by law to be reduced in the form of written documents have been proved, no evidence of any oral agreement or statement is permissible for the purpose of contradicting, varying, adding or subtracting the said written document.

The pith and substance of sub-clause 4 of Section 92 of Indian Evidence Act is, if a party has entered into a contract which is not required to be reduced in writing, but such a contract has been reduced in writing or it is oral, in such situation, it is always open to the parties to the contract to modify its terms and even substitute a new by oral contract and it can be substituted by parole evidence.

14. In terms of Section 92, I proceed to examine the case on hand. Ex.A1 is a registered sale deed. Parties to the document cannot be permitted to let in parole evidence for the purpose of contradicting, varying, adding or subtracting from its the said document.

15. It is the case of the respondent that the suit has been laid based on Ex.A2, pronote which was rejected as invalid by the Appellate Court, which was not challenged by the respondent either by cross appeal or cross objection. Hence, the substantial questions of law 1, 3 and 4 are answered in favour of the appellant herein.

16. The 2nd substantial question of law is whether the suit is barred in terms of Section 23 of the Contract Act or not. Section 23 deals with contracts which are illegal in the strict sense and it would be affected by doctrine of *ex-turpy ciusa oritur non actio*. The said section would apply only if the consideration or object of the agreement is unlawful or is fraudulent or involves or implies injury to the person or property of another or in the opinion of the Court is immoral or opposed to public policy. Hence,

the second substantial question of law does not arise in this case for consideration.

17. In view of the above said findings, I set aside the judgment and decree passed by the First Appellate Court and restore the judgment and decree passed by the trial Court.

With the result, the second appeal is allowed. However, considering the circumstance of the case, no costs.

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Index : Yes

Internet : Yes

To

1. The Principal District Judge
District Court
Tirunelveli

2. The Subordinate Judge
Sub-court
Tirunelveli

3. The Section Officer
VR Section
High Court
Madras 600 104

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